

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

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77-1101

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the Matter of the
Grand Jury Subpoenas of
:
MARIA T. CUETO
:
and
:
RAISA NEMIKIN,
:
Appellants.
:
-----x

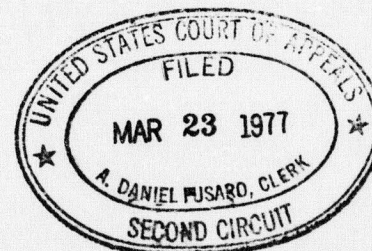
77-1101

REPLY BRIEF FOR APPELLANTS

On Appeal from a Judgment of the United
States District Court for the
Southern District of New York

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THE USE OF A GRAND JURY TO
ATTEMPT TO LOCATE A FUGITIVE
VIOLATES THE SEPARATION OF POWERS
DOCTRINE AND THEREFORE IS AN
ABUSE OF THE GRAND JURY PROCESS.

It is clear from a reading of the government's statement of facts that appellants were subpoenaed in order to aid the FBI in its search for Carlos Alberto Torres. Appellants told the FBI that they had seen Torres on October 26, 1976 at a Commission meeting and that they did not "know the present whereabouts of either Torres or Oscar Lopez, a close associate and a former member of the Commission." (Government's Brief at p. 3). It is also clear that Torres is not being sought as a potential witness before the grand jury, but as a fugitive charged with "unlawful possession of an explosive device and unlawful flight to avoid prosecution."

The search for fugitives is an executive and not a judicial function. And although the power of a grand jury to compel testimony is broad, it is a judicial body; accordingly, its powers can properly be used only in pursuit of judicial and not executive functions and in a manner overseen by the judiciary. Cf., Luther v. Borden, 7 How. 1, 12 L. Ed. 581 (1839).

As Judge Weinfeld has stated:

The federal Grand Jury is an appendage of the court, within whose jurisdiction it sits. As such its jurisdiction is co-extensive with the court's and cannot exceed it. . . . When the instant grand jury undertook to trench upon matters clearly within the purview of executive authority, it exceeded its authority.

Application of United Electrical, Radio and Machine Workers, 111 F. Supp. 858, 865 (D.D.N.Y. 1953)

See also United States v. Smyth, 104 F. Supp. 283, 291 (N.D.Cal., 1952). Thus, the subpoena power of a grand jury is restricted to use for a valid judicial purpose. While the seeking of prospective witnesses is a proper judicial function, looking for fugitives is not. See Hoffman v. United States, 341 U.S. 479 (1951). Judge Pierce found appellants claim of abuse of grand jury process on this point to be invalid on the basis that Torres was being sought as a witness. It is now clear from the government's statement of facts that this is not the case. Torres is being sought as a fugitive by the FBI, and appellants are being called to the grand jury to aid the FBI in their search.

Congress has repeatedly denied the FBI subpoena power. "Apparently Congress has never attempted to vest FBI agents with...private inquisitorial powers." United States v. Minker, 350 U.S. 179, 191 (1956). See also, United States v. O'Conner, 118 F.2d 248, 250 (D.Mass. 1953):

"So far as this Court knows Congress has never in criminal matters vested the executive with an unrestricted subpoena power to uncover information which might aid in the enforcement of criminal statutes and the preparation of criminal cases."

The denial by Congress to the FBI of compulsory process reflects an aversion to executive inquisitorial power which may not be circumvented by permitting the FBI to adopt the subpoena power of the grand jury for its own use.

The grand jury contrary to what seems to be the prevailing general belief is an integral part of the judicial arm of the government and is not a mere tool of the prosecutor. The United States Attorney, the Federal Bureau of Investigation and other branches of the Department of Justice are integral parts of the executive branch of the government. The grand jury, being part and parcel of the judicial branch of government, is subject to supervisory power in the courts, aimed at preventing abuses of its process or authority.

In re Grand Jury Subpoena to Central States, 225 F. Supp. 923, 925 (N.D. Ill., 1964).

It should be emphasized that in the instant case the issuance of these subpoenas upon movants came as a direct result of their interviews with the FBI. (See movants' affidavits attached to the Motion to Quash.) During those interviews, they were told by the FBI that the agents believed that they were withholding information and not being cooperative enough. Consequently, the FBI told them that if they didn't reveal more to them, "things would go bad for them and they would be subpoenaed before the grand jury."

In Durbin v. U.S., 221 F.2d 520 (D.C. Cir. 1954), a U.S. Attorney compelled the appearance of a witness through issuance of a grand jury subpoena and then he and FBI agents questioned the witness (in his office), as part of their own investigation. A unanimous Court of Appeals condemned this tactic.

The Constitution of the United States, the statutes, the traditions of our law, the deep-rooted preferences of our people..... do not recognize the use of a grand jury subpoena, a process of the District Court, as a compulsory administrative process of the United States Attorney's Office.

It was clearly an improper use of the District Court's process for the Assistant United States Attorney to issue a grand jury subpoena for the purpose of conducting his investigation.

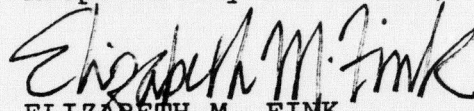
221 F. 2d at 522.

Durbin, together with the other authorities discussed above, is ample authority to declare invalid the subpoena issued here. In each case, the executive branch sought improperly to use the subpoena power of the judicial branch to perform a responsibility committed solely to the executive branch.

CONCLUSION

FOR THE ABOVE-STATED REASONS AND THOSE
RAISED BY APPELLANTS IN THEIR MAIN BRIEF
THIS APPEAL SHOULD BE GRANTED AND THE
JUDGMENT HOLDING APPELLANTS IN CIVIL
CONTEMPT PURSUANT TO 18 U.S.C. §1826 (a)
SHOULD BE REVERSED.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Elizabeth M. Fink". The signature is written in a cursive, flowing style with some capitalization.

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Copy Rec'd

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